Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of Section 631(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992	**MB Docket No. 05-311**

COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO ON THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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I. INTRODUCTION AND EXECUTIVE SUMMARY

The City and County of San Francisco ("San Francisco" or "City") submits these comments on the Second Further Notice of Proposed Rulemaking in which the Federal Communications Commission ("Commission" or "FCC") addresses certain issues that the Sixth Circuit Court of Appeal remanded to the Commission in *Montgomery County, Md*. v. FCC, 863 F.3d 485 (6th Cir. 2017).[1] In particular, the Commission would find that certain so-called "in-kind contributions"[2] that are required by local franchise authorities ("LFAs") and included in cable franchise agreements are "franchise fees" subject to the five-percent cap on franchise fees.[3] The Commission would further find that the fair market value of these in-kind contributions, including the channel capacity used to carry and an LFA's public, educational, and governmental access ("PEG") programming, could be used to reduce a cable operator's franchise fee obligations to the LFA.[4]

In so finding, the Commission ignored federal law that allows LFAs to include in their cable franchises a requirement that cable operators provide capacity to carry PEG channels as an additional benefit of the cable franchise. Congress implicitly required cable operators to be responsible for the costs of that channel capacity. In addition, the Commission would improperly find that cable operators could deduct the fair market value of such capacity—rather than the cost of carrying PEG channels. The Commission reached that conclusion despite the paucity of support in the statutory language or legislative history, and by ignoring the harm it might cause to communities that benefit from PEG programming.

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[1] Second Further Notice of Proposed Rulemaking, *In The Matter of Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992,* 2018 WL 4627672 (F.C.C. Sept. 24, 2018) ("*Second FNPRM*").

[2] San Francisco notes that it does not agree with the Commission's use of the term "in-kind contribution" to describe PEG channel capacity required by cable franchises, because it improperly suggests that this is somehow a substitute for cash payments that an LFA other otherwise could have required. The term "in-kind" does not appear in the statute with reference to PEG channel capacity, so the FCC's intent is unclear.

[3] *Second FNPRM*, 2018 WL 4627672, at p.*9, ¶ 20.

[4] *Id*., at p.*11, ¶ 24.

Finally, the Commission failed to take into account the possibility that some state franchising laws may preclude this interpretation. As the City will show, that is exactly the case in California.

II. THE IMPORTANCE OF PUBLIC, EDUCATIONAL, AND GOVERNMENTAL ACCESS PROGRAMMING

PEG programming is essential to providing local voices in San Francisco and communities around the country. The current proceeding could require many communities to choose between providing a local voice and addressing other community needs. For this reason, it is important that the Commission consider the importance of PEG in cities large and small.

SFGovTV, San Francisco's government access channel, is critical to the operation of a transparent and accountable local government. SFGovTV provides access to the legislative process—by cablecasting meetings of the City's Board of Supervisors and major City commissions. It also produces features that explain local issues, explore neighborhoods, and offer a forum for candidates running for local offices.

The Bay Area Video Coalition operates two public access channels as "SF Commons". SF Commons provides an opportunity for interested members of the public to learn the basics of video production, create their own content, and cablecast their points of view. There are over one hundred active producers that generate more than four hundred hours of locally produced original programming each year that reaches a sizeable audience.

III. COMMENTS

A. Federal Law Provides that PEG Capacity is a Distinct Benefit of a Cable Franchise, so there is No Lawful Basis for Treating the Costs of Providing Such Capacity as Franchise Fees

In the Cable Act of 1984, Congress authorized state and local governments to require cable operators to obtain cable franchises.[5] At that time, Congress envisioned that LFAs would

[5] 47 U.S.C. § 521, *et seq*. ("Cable Act").

obtain certain benefits from those operators in exchange for the right to use the public right-of-way. One obvious benefit was franchise fees, which Congress allowed but capped to five percent of the cable operator's gross revenues.[6]

In a different section, Congress authorized LFAs to include in their local franchises a requirement that the cable operators provide the LFAs with capacity for their PEG channels.[7] Congress recognized that PEG channels benefit local governments and their citizens by providing fora for programming that would not generally be available on commercial channels. PEG channels enabled LFAs to engage with their communities, whether by allowing local residents to watch local government in action, providing educational opportunities, or offering local residents the opportunity to develop their own programming. As Congress noted in 1984:

> ONE OF THE GREATEST CHALLENGES OVER THE YEARS IN ESTABLISHING COMMUNICATIONS POLICY HAS BEEN ASSURING ACCESS TO THE ELECTRONIC MEDIA BY PEOPLE OTHER THAN THE LICENSEES OR OWNERS OF THOSE MEDIA. THE DEVELOPMENT OF CABLE TELEVISION, WITH ITS ABUNDANCE OF CHANNELS, CAN PROVIDE THE PUBLIC AND PROGRAM PROVIDERS THE MEANINGFUL ACCESS THAT, UP UNTIL NOW, HAS BEEN DIFFICULT TO OBTAIN. A REQUIREMENT OF REASONABLE THIRD-PARTY ACCESS TO CABLE SYSTEMS WILL MEAN A WIDE DIVERSITY OF INFORMATION SOURCES FOR THE PUBLIC-- THE FUNDAMENTAL GOAL OF THE FIRST AMENDMENT-- WITHOUT THE NEED TO REGULATE THE CONTENT OF PROGRAMMING PROVIDED OVER CABLE.
>
> ALMOST ALL RECENT FRANCHISE AGREEMENTS PROVIDE FOR ACCESS BY LOCAL GOVERNMENTS, SCHOOLS, AND NON-PROFIT AND COMMUNITY GROUPS OVER SO-CALLED 'PEG' (PUBLIC, EDUCATIONAL, AND GOVERNMENTAL) CHANNELS. PUBLIC ACCESS CHANNELS ARE OFTEN THE VIDEO EQUIVALENT OF THE SPEAKER'S SOAP BOX OR THE ELECTRONIC PARALLEL TO THE PRINTED LEAFLET. THEY PROVIDE GROUPS AND INDIVIDUALS WHO GENERALLY HAVE NOT HAD ACCESS TO THE ELECTRONIC MEDIA WITH THE OPPORTUNITY TO BECOME SOURCES OF INFORMATION IN THE ELECTRONIC MARKETPLACE OF IDEAS. PEG CHANNELS ALSO CONTRIBUTE TO AN INFORMED CITIZENRY BY BRINGING LOCAL SCHOOLS INTO THE HOME, AND BY SHOWING THE PUBLIC LOCAL

[6] 47 U.S.C. § 542.
[7] 47 U.S.C. § 531(b).

> GOVERNMENT AT WORK. H.R. 4103 CONTINUES THE POLICY OF ALLOWING CITIES TO SPECIFY IN CABLE FRANCHISES THAT CHANNEL CAPACITY AND OTHER FACILITIES BE DEVOTED TO SUCH USE.[8]

While Congress excluded from the definition of the term "franchise fee" any "capital costs which are required by the franchise to be incurred by the cable operator . . . for, or in support of the use of, public, educational, or governmental access facilities", this does not support the Commission's decision.[9] This is because nowhere in the Cable Act, did Congress suggest that cable operators could deduct the costs of providing PEG access channels from the legally authorized franchise fees. Instead, Congress implicitly recognized that cable operators would be separately responsible for those costs. Now, some 40 years later, this Commission would reverse course for no apparent reason. Furthermore, in so doing, the Commission could jeopardize the continued viability of PEG programming—to the detriment of local governments and the citizens that rely on that programming—for the sole purpose of providing a windfall to cable operators that have supported PEG for decades.

For this reason, the Commission should reject its tentative conclusion that the fair market value of PEG channel capacity are franchises fees subject to the five-percent cap.

B. The Commission Should Place a Low Value on PEG Channel Capacity

1. For Purpose of Franchise Fees, the Value Should be the Cost of Carrying PEG Channels; Not the Fair Market Value of the Channel Capacity

Once the Commission determined that the value of PEG channel capacity is included with the definition of the term "franchise fee", the Commission then had to decide how to determine the value of the purported in-kind contribution the cable operators were making to LFAs. Without any discussion or analysis, the Commission tentatively concluded that "cable-related, in-kind contributions be valued for purposes of the franchise fee cap at their fair

[8] H.R. REP. 98-934, H.R. Rep. No. 934, 98TH Cong., 2nd Sess. 1984, 1984 U.S.C.C.A.N. 4655, 4677, 1984 WL 37495, at *30 (original in all capitals).
[9] 47 U.S.C. § 542(g)(2)(C).

market value."[10] The Commission then went on to request comments on how "such a market valuation should be performed." [11] In the interest of fairness, the Commission also asks for comments on whether the value of these in-kind contributions should be "at the cost to the cable operator."[12]

When asked in this proceeding how to value something that private businesses are providing to local governments, the Commission had no trouble recognizing the obvious—it should be based on the fair market value. The Commission, however, came to exactly the opposite conclusion when it was asked in another proceeding to the value the assets that the Commission determined local governments must make available to private entities. In that instance, the Commission used tortured logic to find that the value is the costs that local governments would be required to incur to make those assets available.[13]

In the *Infrastructure Order*, the Commission was called upon to consider the meaning of the phrase "fair and reasonable compensation" as it is used in 47 U.S.C. § 253(c).[14] As is relevant here, the Commission had to construe that phrase in the context of the Commission's finding that, absent "legitimate reasons" telecommunications carriers had the right to access local government-owned vertical infrastructure like streetlight poles to install small wireless facilities. [15] While the Commission considered the arguments from local governments that this phrase should mean "market-based rent" for use of such infrastructure, the Commission had no

[10] *Second FNPRM*, 2018 WL 4627672, at p.*11, ¶ 24.
[11] *Id*.
[12] *Id*.
[13] Declaratory Ruling and Third Report and Order, *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 2018 WL 4678555 (F.C.C. Sept 26, 2018) ("*Infrastructure Order*").
[14] *Id*. at p.*28, ¶¶ 71-73.
[15] *Id*. at p.*28, ¶ 73, fn. 217. San Francisco wants to make clear that it soundly disagrees with the Commission's finding that Congress in 47 U.S.C. § 253(a) intended to preempt local government's proprietary activities. See *id*. at pp. *34-*36, ¶¶ 92-97. This is one of a number of issues that San Francisco and other local governments will raise in the Tenth Circuit on the pending review of the *Infrastructure Order*.

trouble rejecting those arguments.[16] Rather, the Commission found that telecommunications carriers were entitled to use government-owned property at cost—the opposite of what the Commission would find here:

> We interpret the ambiguous phrase "fair and reasonable compensation," within the statutory framework we outlined for Section 253, to allow state or local governments to charge fees that recover a reasonable approximation of the state or local governments' actual and reasonable costs. We conclude that an appropriate yardstick for "fair and reasonable compensation," and therefore an indicator of whether a fee violates Section 253(c), is whether it recovers a reasonable approximation of a state or local government's objectively reasonable costs of, respectively, maintaining the ROW, maintaining a structure within the ROW, or processing an application or permit.[17]

Principles of fairness and reasoned decision-making require the Commission to reach similar results in these remarkably similar circumstances, rather than the proposed results that, in both instances, provide unwarranted benefits to private entities while trampling on states' rights and causing undue harm to local governments.

2. No Matter How the Commission Values PEG Channel Capacity, the Actual Value for Franchise Fee Purposes Should Be de Minimis

When Congress first enacted the Cable Act, cable channels were undoubtedly at a premium. In 1984, technological limitations made it difficult for cable operators to have large numbers of channels. In the 1980's, an analog cable channel represented a fixed amount of real estate with a limited total capacity.

That is no longer the case in 2018. Powered by digital technology, the Comcast channel line-up in San Francisco starts at channel one and goes to channel 1899, with gaps of unused channels throughout.[18] Still, in San Francisco Comcast uses six standard definition digital

[16] *Id*. at p.*28, ¶ 73. Local governments had argued that any other construction would amount to "requiring taxpayers to subsidize private companies' use of public resources" in violation of their state constitutions. *Id*.
[17] *Id*. at p.*28, ¶ 72.
[18] https://www.xfinity.com/support/local-channel-lineup/

channels to carry the City's PEG programming. Comcast could create new standard definition digital channels with little effort and minimal costs.

Other video providers in San Francisco have found creative ways to carry PEG channels. AT&T, for example, uses only channel 99 to carry all PEG programming in the Bay Area. Clicking on channel 99 takes the AT&T subscriber to the internet, where the subscriber will find a menu of PEG channels from all of AT&T's service territory in the Bay Area. AT&T is able to provide its subscribers with access to dozens of PEG channels using only one of its thousands of channels.

For these reasons, whether the Commission uses fair market value or costs to determine the value of PEG channel access, the Commission must determine that any actual value for franchise fee purposes is de minimis. The Commission's current path will require an elaborate and contentious new bureaucratic process to capture the value of a regulatory structure designed for the 1980's video distribution market that possibly lead to unnecessary and costly litigation.

C. Under California Law, the Value of PEG Channel Access Should be Excluded from the Definition of "Franchise Fee" in the Cable Act

In 2006, the California Legislature adopted the Digital Infrastructure and Video Competition Act ("DIVCA").[19] Among other things, DIVCA made the California Public Utilities Commission ("CPUC") "the sole franchising authority for a state franchise to provide video service." [20] DIVCA ended local cable franchising in California by expressly prohibiting local governments from requiring "the holder of a state franchise to obtain a separate franchise or otherwise impose any requirement on any holder of a state franchise." [21] DIVCA also

[19] Cal. Pub. Util. Code § 5800, *et seq*.
[20] Cal. Pub. Util. Code § 5840(a).
[21] Cal. Pub. Util. Code § 5840(a).

authorized existing cable franchise holders to abrogate their un-expired local franchises and obtain state franchises.[22]

DIVCA does not limit the CPUC to issuing franchises only to a "cable operator" as that term is defined in the Cable Act.[23] Rather, the CPUC may issue a "state franchise" to any "video service provider."[24] DIVCA broadly defines the term "video service" to mean "video programming services, cable service, or OVS service provided through facilities located at least in part in public rights-of-way without regard to delivery technology, including Internet protocol or other technology."[25] So, under DIVCA, both cable operators and non-cable operators that provide video service may obtain state franchises and provide services to customers in their chosen service territories. AT&T, which serves San Francisco, is among the state franchise holders in California that are not also cable operators.

That fact has important implications for the Commission's decision here. Last year, the district court in *Comcast of Sacramento I, LLC v. Sacramento Metropolitan Cable Television Commission* had the opportunity to consider the question of whether all fees required by DIVCA were franchise fees under the Cable Act and subject to the five-percent cap.[26] DIVCA required state video franchise holders to pay an annual fee to the CPUC.[27] Comcast argued that this fee was a franchise fee under the Cable Act. Because the Sacramento Metropolitan Cable Television Commission ("SMCTC") required Comcast to pay a franchise fee of five percent of its gross revenues, Comcast sought a declaration that it could deduct part of the CPUC fee from the franchise fee otherwise due SMCTC "pursuant to the principle of federal preemption."[28]

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[22] Cal. Pub. Util. Code § 5840(o)(3).
[23] 47 U.S.C. § 522(5).
[24] *See* Cal. Pub. Util. Code § 5830 (definitions).
[25] Cal. Pub. Util. Code § 5830(s).
[26] *Comcast of Sacramento I, LLC v. Sacramento Metropolitan Cable Television Commission*, 150 F. Supp. 3d 616 (E.D. Cal. 2017).
[27] Cal. Pub. Util. Code § 441.
[28] *Comcast*, 150 F. Supp. 3d at 624.

SMCTC argued that the CPUC fee was not a "tax, fee, or assessment . . . imposed by a franchising authority . . . on a cable operator or cable subscriber . . . solely because of their status as such", because state video franchise holders that are *not* cable operators must also pay the CPUC fee.[29] The court agreed with SMCTC, holding that: "Because the CPUC fee is not imposed on cable companies 'solely because of their status as such,' and because it is a 'fee . . . of general applicability, the CPUC fee is not a 'franchise fee' within the meaning of section 542."[30]

That holding applies here too. When California took control of video franchising from local governments it was careful to protect local government PEG offerings. DIVCA requires a state franchise holder to "designate a sufficient amount of capacity on its network to allow the provision of the same number of public, educational, and governmental access (PEG) channels, as are activated and provided by the incumbent cable operator that has simultaneously activated and provided the greatest number of PEG channels within the local entity under the terms of any franchise in effect in the local entity as of January 1, 2007."[31] Like the requirement to pay fees to the CPUC, the PEG channel requirement applies to all state video franchise holders—not just those that are cable operators. For this reason, a cable operator's costs to carry PEG channels are not franchise fees under California law but fees of "general applicability."[32]

The Commission should find that under California law the costs to carry PEG channels are not franchise fees.

[29] *Id*.
[30] *Id*.
[31] Cal. Pub. Util. Code § 5870(a).
[32] See also *City of Eugene v. Comcast of Oregon II, In*c., 359 Or. 528, 558 (2016) (holding that a license fee that applies to all companies that provide telecommunications services is not a "franchise fee" within the meaning of section 542).

IV. CONCLUSION

The City and County of San Francisco asks that the Commission reject its tentative finding that the fair market value of certain so-called in-kind contributions required by a cable franchise are franchise fees under the Cable Act. At the very least, the Commission should value those contributions at cost rather than fair market value, and find that the value is de minimis. Finally, the Commission should consider whether a different result is required in California and other states that have enacted laws allowing non-cable operators to provide video services.

Dated: November 14, 2018

Respectfully submitted,

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